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No. 699

In the

Supreme Court of the United States

..... Term, 1955

JAMES BUCHANAN HILL,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

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THE STATE OF TEXAS,

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ON A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Criminal Appeals of the State of Texas (R. 39 is reported at Texas Criminal Reports, S. W. 2d . (Opinions fully printed appendix pages 13-18.)

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on the 3rd day of November, A. D. 1954, to which Petitioner filed a Motion for Rehearing, which Motion was overruled on the 5th day of January, A. D. 1955. The jurisdiction of this Court is envoked under 28 U. S. Code annotated Section 1257(3). Defendant objected to the search and seizure made by the purported officers of the City of Cleburne, Texas, while riding in an automobile, without a warrant and without probable cause in violation of IV, V, and XIV Amendments of the Federal Constitution, at the time of the trial before the District Court of Johnson County, Texas, the Honorable Penn Jackson, District Judge, presiding, which objection was overruled and exception thereto duly noted (R., p. 72). The Defendant also objected to the admission of the power of the officers of Johnson County to arrest without a warrant for the reason that there was no ordinance providing such authority and establishment of a police department prescribed in the City charter, which objection was overruled and exceptions noted (R., pp. 67, 68). The Defendant objected to the introduction of evidence discovered by reason of illegal arrest and in violation of the constitutional provisions of the United States and State of Texas, and Article 727a, V. A. C. C. P., Texas, all of which are indexed in the Record on page 4, all of which objections were overruled and exceptions noted thereto. Judgment was entered, whereupon Defendant in open Court excepted to such judgment and gave

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notice of appeal to the Court of Criminal Appeals of the State of Texas at Austin, Texas (R., p. 36). The Defendant cited as error the illegal search and seizure, inadmissibility of the evidence unlawfully obtained. The Court of Criminal Appeals of the State of Texas in its opinion held, although there was no search warrant or direct report of violation of a felony or of breach of peace by a credible person, to the officers and although the officers had not seen any felony or breach of peace committed in their presence, that mere suspicion was sufficient probable cause for the arrest.

The IV and V Amendments to Federal Constitution apply to this illegal search and seizure by virtue of Article 727a, V. A. C. C. P., State of Texas (Illegal Evidence Rule), which specifically invokes the benefits of the above Amendments.

The Defendant in his Motion for Rehearing urged the Court to correct the error made by the Court in its original opinion, but the Court held that said evidence was still admissible and that there was probable cause for the arrest.

Whereupon Petitioner obtained a stay of execution of ninety (90) days pending the perfection of his application for writ of certiorari in this Court (R., p. 59). The petition for writ of certiorari to the Court of Criminal Appeals of the State of Texas was timely filed.

QUESTIONS PRESENTED

1.

Does an unreasonable search and seizure by State officers violate the 4th and 5th amendments of the Federal Constitution where the amendments have been specifically invoked by State statute?

2.

Does an unreasonable search and seizure by State officers in a State prosecution violate the 14th Amendment of the Federal Constitution?

3.

Does the departure of the Court of Criminal Appeals from established legal rules (Illegal evidence rule) in Petitioner's case violate the 14th Amendment Federal Constitution where the Court recognizes the rule but fails to enforce it when called for by the facts?

STATUTE INVOLVED

IV, V and XIV Amendments, Federal Constitution.

Article 1723, Penal Code of State of Texas.

Article 727a, V. A. C. C. P. of State of Texas.

STATEMENT

On the 29th day of December, 1953, your Petitioner, James Buchanan Hill, was indicted by the Grand Jury of Johnson County, Texas, and charged with having in his

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possession and control a bomb. Specifically the indictment charged

> "that James Buchanan Hill on or about the 6th day of December, A. D. 1953, and anterior to the presentment of this indictment, in the County of Johnson and State of Texas, was then and there unlawfully possessed and have in his control a bomb, to wit: a collection of nitro glycerin capable by its ignition and explosion of causing damage to persons and property."

Upon the trial of this cause before a jury the District Court of Johnson County, Texas, your Petitioner was found guilty and the jury assessed a penalty of five (5) years in the penitentiary. Upon appeal the case was affirmed by the Court of Criminal Appeals of Texas, to which Court this Writ of Certiorari is directed.

The evidence reveals that L. E. Smith, who was called as a State's witness, testified that on the 6th day of December, A. D. 1952, he was living in Cleburne, Texas, and that on the night of the 6th of December, 1952, that he and his family had been to a theatre in Cleburne and that after the theatre he and his family came out and went to their car, which was located in a parking lot at the corner of James and Caddo Streets in Cleburne, Texas, and surrounding said parking lot was a prescription pharmacy, the Yale Theatre and the Liberty Hotel, and that at the time he came out of the theatre it was around ten o'clock p. m. and that said parking lot was well lighted; there were lights on the inside of the pharmacy and there were street lights and lights around the top of the pharmacy and lights

from the hotel across the street, and that he saw two fellows on this parking lot and saw them get into an automobile; that he saw one of the men carrying a bag, which he later identified as Glen Roach, but that he failed to identify the second man as your applicant herein, and that he and his family left and he went to find officers for the reason that he was suspicious that something was happening, but that he did not see any crime committed. That he found a police car which contained Harold Nelson, Cliff Benson and Bob Kimbrell and that he gave them a license number, which he claimed he had committed to memory, of said automobile and when the officers went back to this location they saw said automobile backing from the parking lot with one man in it and that around the corner were two men standing on a curb and the car drove around where the other two men were standing and stopped and the two men got into the car.

Harold Nelson was called by the State and was a purported officer on the police force of Cleburne. He testified that at the time he stopped said car that he asked the occupants thereof to get out. He testified that he saw the car started from its parking location and that two men got in it and that they just drove normally, there was no speeding, they didn't pass any stop signs or red lights; that no law was violated that would cause him to stop said vehicle, and that he stopped them because they were under suspicion only, that nothing unusual had attracted his attention, and if he hadn't had the license number that he would not have been attracted by them at all, and that he had no search warrant at the time he arrested them and none of the other

officers had a search warrant, and yet he said that the report made to him by Smith was that there was something down there and that he, Smith, supposed that they were stealing hub caps and fender skirts, a misdemeanor in Texas. That upon opening the door he saw a bag, but that upon examining the bag, after he took it out of the car, he found that it contained nitro glycerin, all of which evidence was discovered after the illegal arrest. That the next morning after the arrest Smith was brought in to identify the men.

It is the contention of your Petitioner that the search and seizure were illegal and that any evidence found therein was not admissible against this applicant and that without such inadmissible evidence a conviction could not have been had.

The jury convicted your Applicant and assessed a penalty of five (5) years in the penitentiary, from which your Applicant appealed to the Court of Criminal Appeals of Texas.

REASONS FOR GRANTING THE WRIT

I.

The Constitutional questions regarding illegal search and seizure were raised properly in the Trial Court and were urged before the Court of Criminal Appeals of Texas, the court of last resort in criminal cases. The granting of this writ will clarify many fringe areas of law between the States and Federal Government. Texas has for a number

of years recognized the illegal evidence rule by virtue of Article 727a, V. A. C. C. P., Texas, which provides:

> "No evidence obtained by an officer or other person in violation of any provision *of the Constitution or laws of the United States* or of this State shall be admitted in evidence against the accused on the trial of any criminal case." (Emphasis ours.)

The State statute specifically invokes the benefits of the IV and V Amendments of the Federal Constitution. This statute affords citizens of Texas the protection of the Bill of Rights, Federal Constitution, against illegal action by State officers.

The search and seizure of automobile without probable cause violates the IV Amendment.

Carroll v. U. S., 267 U. S. 132, 147, 149.

The statutes of the State of Texas providing for arrest without warrant, Articles 212 through 217, V. A. C. C. P. (Appendix pages), did not justify Petitioner's arrest nor did any local ordinance permit an arrest on the facts in this case. Therefore, the seizure cannot be justified by legal arrest. There was no consent feature.

See also on question of illegal search and seizure as violating rights of Petitioner under IV Amendment, Federal Constitution.

Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 40, 65 L. Ed. 319, 24 A. L. R. 1426.

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The decision of the Texas Court is adverse to the rights of Petitioner as guaranteed by the Federal Constitution.

Summary

(a)

Article 727a (above) makes the decision of:

Byars v. U. S., 273 U. S. 28, 33,

inapplicable, and the fact that State officers made the illegal search and seizure would not take the case out of IV Amendment.

(b)

The IV Amendment is binding on the States,

Wolf v. Colorado, 338 U. S. 25.

(c)

A statute such as Article 727a, C. C. P., Texas, may specifically invoke the benefits of the IV Amendment. See:

Farrington v. Tokushige, 273 U. S. 284;
Yu Cong Eng v. Trinidad, 271 U. S. 500.

II. (a)

This writ should be granted for the further reason that the unreasonable search and seizure of Petitioner's car and contents violated the XIV Amendment, Federal Constitution.

Lustig v. United States, 338 U. S. 74, 69 S. Ct. 1372;
Wolf v. Colorado, 338 U. S. 25, 27-28, 69 S. Ct. 1359;
Rochin v. California, 342 U. S. 165.

It is apparent that the Texas illegal evidence rule when ignored by the Texas Court violates Justice Frankfurter's view of due process. See also:

*Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 552 * * *;*

Hamond Packing Co. v. Ark., 212 U. S. 322, 348.

(b)

The Texas Court's action in failing to enforce the illegal evidence rule without overruling same violated the XIV Amendment where called for by the facts.

Texas has in innumerable cases recognized the rule:

Sheppard v. State, 132 S. W. 2d 861;

Gonzalez v. State, 187 S. W. 2d 910;

Crawford v. State, 189 S. W. 2d 871;

Fowler v. State, 235 S. W. 2d 183;

Nowlin v. State, 68 S. W. 2d 496.

The facts of Petitioner's case put Petitioner squarely within the rule.

The Texas Court's arbitrary ruling deprived Petitioner of due process of law under XIV Amendment.

Summary

Once a State has established a valid procedural rule, the departure therefrom violates due process providing the

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facts place the accused within the rule. Of course the Texas Court could overrule the case law but could not deprive Petitioner of a valuable right without due process being violated.

Importance

The questions presented here are vastly important to the several States. It is unusual and presents a question of first impression.

This was pointed up in the recent decision in *Jones v. U. S., 217 F. 2d 381, 383*, regarding illegally obtained evidence.

CONCLUSION

Petitioner respectfully prays that the Honorable Court grant this Petition for Certiorari and that the writ issue to the Court of Criminal Appeals of Texas.

The petition should be granted.

CHARLES W. TESSMER,
202 Fidelity Building,
Dallas, Texas,
Counsel for Petitioner.

I hereby certify that 3 copies of this petition have been served on the Attorney General of the State of Texas by mailing, postage prepaid, to his office at Austin, Texas, this day of , 1955.

CHARLES W. TESSMER

APPENDIX

No. 27,098

James Buchanan Hill,

Appellant,

v.

The State of Texas,

Appellee.

Appeal from Johnson County

OPINION

The offense is possession of a bomb; the punishment, five years in the penitentiary.

L. E. Smith testified that about 10 P. M. on December 6, 1952, near the Prescription Pharmacy, he saw two men standing between his automobile and an Oldsmobile; that both men ran, one going around the Oldsmobile and getting in the back seat thereof and the other man running around to the back of the Oldsmobile and around another automobile while stooped over and carrying a small bag, and then getting into the right front seat of the Oldsmobile; that he then inspected his automobile to determine if anything had been stolen therefrom; that he made a mental note of the license number of the Oldsmobile and left the scene; and that he notified the police officers, described the Oldsmobile and gave them its license number. He further stated that the bag shown him during the trial was about the size of the bag referred to above.

Harold Nelson testified that while on duty as a policeman for the City of Cleburne and accompanied by Policemen Kimbrell and Benson he had a conversation with the witness Smith about 10 P. M. on December 6, 1952, and then they saw two men near the Prescription Pharmacy and also the same automobile described to them by witness Smith with a man sitting under the steering wheel; that the officers turned around and, as they returned toward the Prescription Pharmacy, observed the Oldsmobile moving and saw the two men who were standing in front of the Pharmacy get in the front seat of the Oldsmobile and drive away.

He further testified that they stopped the Oldsmobile about six blocks away and that appellant was driving with Glenn Roach seated in the middle of the front seat and Mack Barnes seated on the right front; that he could smell whiskey on the breath of each of them; that he saw a bag from the outside of the Oldsmobile on the right front floor board, removed it, and found a small cellophane bag in it and identified the substance contained in the cellophane bag as being nitroglycerin; that the bag he removed from the Oldsmobile also contained a wire with a detonating cap, a small wad of cotton, a wire with a detonated cap, a pair of cotton gloves, and an assortment of tools.

Officer Benson testified that when appellant was asked about the bag and its contents he stated that "the stuff belongs to me" and "I am just going to take it up here and give it to my relative, my cousin"; and Officer Kimbrell stated "I heard the man say he was taking the tools to a relative in Cresson."

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Chemist Tullis, of the Texas Department of Public Safety, testified that he made several tests to determine if the substance was an explosive and the nature of the explosive and determined that it was capable of explosion and contained nitroglycerin. He further stated that the amount of the substance delivered to him could have caused death to a person and considerable damage to property.

Appellant, while testifying in his own behalf, stated that he was in his Oldsmobile, accompanied by Glenn Roach and Mack Barnes, when stopped by the police; that he had no knowledge of the zipper bag or its contents being in his automobile and at no time possessed nitroglycerin or a bomb. He denied telling the officers that the bag and its contents belonged to him and that he was taking them to some relatives.

The jury resolved the issues of fact against appellant and we find the evidence sufficient to support the verdict.

Appellant contends that the search of his automobile was made without probable cause and that the results of the search were not admissible in evidence because same was illegally obtained, there being no warrant for his arrest or search warrant for his automobile.

It was shown that appellant owned the Oldsmobile and that the officers did not have his consent to search it; that they had no warrant for his arrest or search warrant for the Oldsmobile.

On the issue of probable cause and in the absence of the jury, Officer Nelson stated that the witness Smith reported to him that two men near the Prescription Pharmacy were

prowling, running around cars and were acting suspiciously and "were more or less sneaking around there, and squatting down, and concealing themselves, or their persons, around those cars there * * * that he figured they were stealing," and further that "they were probably getting these hub-caps and fender skirts * * * being stolen off of cars around here at the time."

We are of the opinion that the facts related to and known by Officer Nelson as detailed herein constituted sufficient probable cause to authorize the officers to stop and search appellant's automobile. The search being legal the fruits thereof were admissible in evidence. *Jones v. State, 122 Tex. Cr. R. 44, 55 S. W. 2d 560.*

Appellant complains of the failure of the court to define nitroglycerin in his charge to the jury.

We think that the word nitroglycerin is a word of such common usage and has such a well recognized meaning as not to here require definition.

We find the evidence sufficient to show that the appellant possessed a collection of nitroglycerin which was capable of explosion and causing damage to persons and property.

Appellant contends that the court erred in refusing to give his special requested charge that if the substance in question consisted of dynamite or some other explosive substance other than a collection of nitroglycerin, then to find him not guilty.

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We are unable to find any evidence to support the issue raised by said charge, thus no error is shown.

Finding no reversible error, the judgment is affirmed.

Belcher, Judge

(Delivered November 3, 1954)

Opinion approved by the Court.

A TRUE COPY

Attest:

GLENN HAYNES
Glenn Haynes, Clerk,

Court of Criminal Appeals of Texas

(Seal)

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 27,098

JAMES BUCHANAN HILL,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM DISTRICT COURT OF
JOHNSON COUNTY, TEXAS

AFFIRMED

OPINION BY JUDGE BELCHER

NOVEMBER 3, 1954

This cause came on to be heard on the transcript of the record of the Court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is ordered, adjudged, and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

A TRUE COPY

Attest:

GLENN HAYNES
Glenn Haynes, Clerk,

Court of Criminal Appeals of Texas

(Seal)

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CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify, in Cause No. 27,098

JAMES BUCHANAN HILL,

Appellant,

vs.

THE STATE OF TEXAS,

Appellee.

Appellant's Motion for Rehearing was denied, without written opinion, on January 5, 1955.

Witness my hand and seal of said Court, this 23rd day of March, A. D. 1955.

Glenn Haynes
Clerk, Court of Criminal Appeals

(Seal)

MINUTES OF COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

NO. 27,098

JAMES BUCHANAN HILL,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

APPEAL FROM DISTRICT COURT
OF JOHNSON COUNTY, TEXAS

MOTION FOR REHEARING OVERRULED
WITHOUT WRITTEN OPINION

JANUARY 5, 1955

This cause came on to be heard on Appellant's Motion for Rehearing, and the same being considered, it is ordered, adjudged, and decreed by the Court that said motion be and the same is hereby in all things overruled.

A TRUE COPY

Attest:

GLENN HAYNES
Glenn Haynes, Clerk,

Court of Criminal Appeals of Texas

(Seal)

STATE OF TEXAS
COUNTY OF TRAVIS

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that Cause No. 27,098, JAMES BUCHANAN HILL vs. THE STATE OF TEXAS, was affirmed by this Court on November 3, 1954, and Appellant's Motion for Rehearing was denied, without written opinion, on January 5, 1955.

THEREFORE, this case was disposed of by this Court with the overruling of Appellant's Motion for Rehearing and mandate would have issued if Appellant had not timely filed a Motion to Stay Issuance of Mandate for Application for a Writ of Certiorari in The United States Supreme Court.

The appellant having exhausted all remedy in this Court with the overruling of his Motion for Rehearing, the said judgment became final on the docket of this Court.

WITNESS my hand and seal of said Court, at office in Austin, Texas, this 23rd day of March, A. D. 1955.

Glenn Haynes,
(Seal) Clerk, Court of Criminal Appeals.

V. A., C. C. P., TEXAS STATUTES

Article 212.—(259) (247) Offense within view

A peace officer or any other person, may, without warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony, or as an "offense against the public peace." O.C. 209.

ARTICLE 213 (260) (248) Within view of Magistrate

A peace officer may arrest, without warrant, when a felony or breach of the peace has been committed in the presence or within the view of a magistrate, and such magistrate verbally orders the arrest of the offender. O.C. 210.

ARTICLE 214 (261) (249) Authority of municipality

The municipal authorities of towns and cities may establish rules authorizing the arrest, without warrant, of persons found in suspicious places, and under circumstances which reasonably show that such persons have been guilty of some offense or breach of the peace, or threaten, or are about to commit some offense against the laws. O.C. 211.

ARTICLE 215. (262) (250) When felony has been committed

Where it is shown by satisfactory proof to a peace officer, upon the representation of a credible person, that a felony has been committed, and that the offender is about

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to escape, so that there is no time to procure a warrant, such peace officer may, without warrant, pursue and arrest the accused. O.C. 212.

ARTICLE 216. (263) (251) Rights of officer

In each case enumerated where arrests may be lawfully made without warrant, the officer or person making the arrest is justified in adopting all the measures which he might adopt in cases of arrest under warrant. O.C. 213.

ARTICLE 217. (264) (252) Must take offender before magistrate

In each case enumerated in this chapter, the person making the arrest shall immediately take the person arrested before the magistrate who may have ordered the arrest, or before the nearest magistrate where the arrest was made without an order. O.C. 214.

V. A. P. C. of Texas—

Article 1723. Offenses in connection with bombs

* * * *Manufacturing, owning, storing, keeping, selling, transporting, possessing or having control*—Sec. 2. Whoever shall manufacture, own, store, keep, sell, transport, possess or have in his control a bomb, as defined in Section 1, shall be guilty of a felony and upon conviction shall be confined in the State Penitentiary for not less than five (5) years and not more than twenty-five (25) years and fined not less than One Thousand Dollars ($1,000) and not more than Ten Thousand Dollars ($10,000), either or both. If

mayhem or death shall result from such act, then the death penalty may be assessed. * * *.

AMENDMENTS TO FEDERAL CONSTITUTION—

AMENDMENT IV—Searches and Seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V—Capital Crimes; Due Process

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

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United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.